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IN THE

Supreme Court of the United States

NOVEMBER TERM, 1971

No. ——

MARTIN SPAGAT and POLK BROS., INC., an Illinois Corporation, both Individually and in a Representative Capacity,

Petitioners,

vs.

GEORGE MAHIN, as Director of Revenue, ALAN J. DIXON, Successor to ADLAI E. STEVENSON, III, as State Treasurer, and WILLIAM J. SCOTT, As Attorney General of the State of Illinois,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

EDWARD A. BERMAN,
SCHLIFKIN & BERMAN,
134 N. La Salle Street,
Chicago, Illinois

Attorneys for Petitioners —Martin Spagat, et al.

BENJAMIN CRANE,
CRANE AND KRAVETS,
100 W. Monroe Street,
Chicago, Illinois

Attorneys for Plaintiffs-Petitioners—Polk Bros. Inc., et al.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

Petitioners, Martin Spagat and Polk Bros., Inc., individually and in a representative capacity, pray that a Writ of Certiorari issue to review the Judgment and Opinion of the Illinois Supreme Court entered in this case halding the sale and installation of wall-to-wall carpeting to be a sale at "retail" and not the sale of a "service", taxable under the Illinois Service Use Tax Act (Ill. Rev. Stats. 1967, Ch. 120, pars. 439.31, *et seq.*) and related statutes.

OPINION BELOW

The Opinion of the Illinois Supreme Court is reported in —— Ill. 2d ——, 277 N.E. 2d 834 (issued November 30, 1971, rehearing denied January 27, 1972).

That Opinion appears in the Appendix hereto.

JURISDICTION

The judgment of the Illinois Supreme Court was entered on November 30, 1971, and the petitioners' petition for rehearing was denied on January 27, 1972. This Petition for Certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U. S. C. §1257 (3).

QUESTIONS PRESENTED

Is the Illinois Supreme Court's classification of the business of selling installed wall-to-wall carpeting to be a retail sale (Ill. Rev. Stat. 1961, ch. 120, sec. 440) and not the sale of a service (Ill. Rev. Stat. 1961, ch. 120, sec. 439.103), with the transfer of the property being a mere incident thereto, a denial of due process and equal protection of law—where every other like transaction is deemed to be a sale of a service?

Can the Illinois Supreme Court determine consistent with due process of law that the services performed in installing wall-to-wall carpeting are not what the customer contracted for but are merely incidental to the sale of the carpeting itself, where every other like transaction is deemed to be a sale of a service?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Fourteenth Amendment, Section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

STATUTES INVOLVED

Section 1 of the Retailers' Occupation Tax Act (Ill. Rev. Stat. 1961, Ch. 120, Par. 440) provides in pertinent part:

> "A person who holds himself out as being engaged (or who habitually engages) in selling tangible personal property at retail shall be deemed to be a person engaged in the business of selling tangible personal property at retail hereunder with respect to such sales (and not primarily in a service occupation) notwithstanding the fact that such persons designs and produces such tangible personal property on special orders for the purchaser and in such a way as to render the property of value only to such purchaser, if such tangible personal property so produced on special order serves substantially the same function as stock or standard items of tangible personal property that are sold at retail".

Service Occupation Tax Act (Ill. Rev. Stat. 1961, Ch. 120, §439.103) provides for a tax:

"upon all persons engaged in the business of making sales of service (hereinafter referred to as servicemen) at the rate of 3% of the cost price of all tangible personal property transferred by said serviceman either in the form of tangible personal property or in the form of real estate as an incident to a 'sale of service' . . ."

Section 439.33 of the Service Use Tax Act provides for a tax:

"upon the privilege of using in this State real or personal property acquired as an incident to the purchase of a service from a serviceman."

"Sale of service means any transaction except: (1) a retail sale of tangible personal property taxable under the Retailer's Occupation Tax Act . . . or under the Use Tax Act . . ." (Ch. 120, Secs. 439.32, 439.102).

STATEMENT OF THE CASE

Plaintiff Martin Spagat is a customer of plaintiff Polk Bros., Inc. and this action was commenced by each on his own behalf and on behalf of all others similarly situated.

Plaintiff Polk (and members of its class) enters into contracts with plaintiff Spagat (and members of its class) whereby Polk is retained to both: (1) furnish carpeting and other floor covering to the exact specifications required by Spagat to cover entirely and configure precisely to all the peculiar dimensions of a particular floor area designated by Spagat, and (2) install that carpeting, so designed, by affixation to the surface of that floor area by methods and in a manner best appropriate to insure permanence of its placement over the entire area.

Defendants have demanded, and plaintiffs have paid Retailers Occupation tax and Use tax. Plaintiffs assert their immunity to those Acts, and the exclusive application to them of the Service Occupation Tax, and Service Use Tax Acts.

The trial court determined that the plaintiffs were liable under the Illinois Service Tax statutes and not the Retailers' Occupation Tax as amended in 1961, and therefore that Rule No. 20 of the respondent, Department of Revenue, was inapplicable to the petitioners.

The Illinois Supreme Court reversed the trial court and held that the skillful services performed in the sale of installed wall-to-wall carpeting are "merely incidental to and an inseparable part of the transfer" of the carpeting—tangible personal property. The Court determined that the application of the 1961 amendment of the Retailers' Occupation Tax Act and Use Tax Act to these transactions did not constitute an unconstitutional attempt to bring essentially service occupations within those Acts. The Court determined that wall-to-wall carpeting and carpeting purchased over-the-counter from a retailer do serve "substantially the same function". The court concluded, therefore, that the 1961 amendments to the Retailers' Occupation Tax Act were intended to apply to the sale of wall-to-wall carpeting.

I.

REASONS FOR GRANTING THE WRIT

The presently standing opinion and judgment of the Illinois Supreme Court brings about and results in a denial of equal protection and the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The case involves principles, the settlement of which is important to the public and not just the parties. Illinois' entire scheme of taxation of retail occupations and those of service occupations has been actually obliterated by the opinion and judgment of the Illinois Supreme Court.

That presently standing opinion and judgment of the Illinois Supreme Court unconstitutionally singles out and discriminates against these petitioners by arbitrarily selecting these petitioners and removing them from comprehension of Illinois Service Occupation Tax Acts where they belong as members of the class of occupations under those Acts and directing the subjectation of these petitioners to Illinois Retailers' Occupation Tax Acts, while leaving every other member of the service occupation tax class remaining subject to Illinois Service Occupation Tax Act.

The fact that the presently standing opinion and judgment of the Illinois Supreme Court creates and results in the subjectation of these petitioners to deprivation of the equal protection and the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States was directed to the attention of the Illinois Supreme Court in the petition for rehearing filed by these petitioners. That Court ignored the constitutional offensiveness urged by these petitioners to have been

committed by that Court. That petition for rehearing was denied.

These petitioners respectfully submit the petition for rehearing filed by them with the Illinois Supreme Court as their grounds and reasons assigned here for the issuance by this court of its writ of certiorari to review the presently standing opinion and judgment of the Illinois Supreme Court. That petition for rehearing filed by these petitioners absent caption and conclusion is in full as follows:

"This Court's Presently Standing Opinion Renders Meaningless, if not indeed, Nugatory, the Illinois Service Occupation Tax Act, and the Acts Corollary thereto.

On page 4 of this Court's opinion this Court finds the standard applicable to the issues in this case as follows:

> "If the article has no value to the purchaser except as a result of services rendered by the vendor and the transfer of the article to the purchaser is an actual and necessary part of the service rendered, then the vendor is engaged in the business of rendering service and not in the business of selling at retail. If the article sold is the substance of the transaction and the service rendered is merely incidental to and an inseparable part of thetransfer to the purchaser of the article sold, then the vendor is engaged in the business of selling at retail". (citing cases)

This Court then concludes by stating that:

> "Applying this standard to the sale of wall-to-wall carpeting, it seems clear that it is the carpeting which is the substance of the transaction, and the services involved in laying the carpeting wall-to-wall, no matter how skillfully performed, are 'merely incidental to and an inseparable part of the transfer' ".

First, plaintiffs respectfully submit that this Court, by applying the above standard, has overlooked the fact

that "the article sold", the carpeting here, *indeed* "has no value to the purchaser except as the result of services rendered by the vendor", and *indeed* the transfer of the carpeting to the purchaser "is an actual and necessary part of the service rendered".

It simply is not reasonable to conceive that the carpeting selected by a purchaser, by that purchaser pointing to a roll of carpeting material and indicating that this is the carpeting he wants affixed to his premises as a result of services rendered by the vendor—to then find as this Court has found that this amount of carpeting of so many square yards, is "of value" to that purchaser without the necessary "result of services rendered by the vendor". *Only* upon the rendition of that service by the vendor to the total amount of carpeting material is it possible for that purchaser, and commensurate with common understanding and reasoning, to have carpeting material of any value to that purchaser.

Plaintiffs respectfully submit that the transactions in issue here come exquisitely within the standard applied by this Court.

In further confirmation, if indeed "the article sold (the carpeting material)" is the substance of the transaction and the service rendered is merely incidental to the carpeting material itself, the observation which occurs and the question which follows is—just what in the world would that purchaser do with that bolt of so many square yards of carpeting when he took it home? It appears that under the reasoning applied by this Court that roll of carpeting material being the substance of the transaction. Retailers' Occupation Tax liability is imposed on that purchaser *despite the fact* that this carpeting material is of no value to that purchaser as such at all. This

simply is not what this purchaser wanted. This simply is not what that purchaser contracted for, and it seems apparent that it is the skilled service of the vendor to do all things necessary to be done to that carpeting which is the actual substance of that contractual relationship. Such service is not merely "incidental to" the contractual relationship entered into between the parties, but, to the contrary, such facts demonstrate that such skilled service is inherent in the very nature of this transaction, is vital, is necessary, is indispensable, and without it that carpeting material patently is of no value to the purchaser. That purchaser contracted for "installed carpeting". He did not contract to buy a "carpet".

Plaintiffs respectfully submit that this Court has overlooked the object of the contractual relationship entered into between purchasers of wall-to-wall carpeting and their vendors and through such oversight has erred in imposing a contractual objective on the parties here, belied by the facts, refuted by the understanding of the parties here, both vendors and purchasers, resulting in a finding by this Court contrary to reason and all of the above.

Further, this Court concludes that "the services involved in laying the carpeting wall-to-wall, no matter how skillfully performed are 'merely incidental to *and an inseparable part* of the transfer' ". (Emphasis added)

If the skillful services performed are an inseparable part of the transfer, then, a *fortiori,* "the article sold" simply cannot be the "substance of the transaction". Under this Court's own logic it necessarily appears that the skillful services performed being "an inseparable part of the transfer", *ergo* that essential is of equally if not more important stature than the carpeting which this

Court says is the "substance of that transaction". This is exactly what plaintiffs say. Neither the carpeting nor the service are "incidental" to each other. One without the other simply is not what the parties here, both vendors and purchasers, have contracted for. One absent the other is not in the contract before the Court. The essential presence of *both* is the "substance of these contracts".

Plaintiffs respectfully submit that this Court's presently standing opinion not only, and erroneously, legislates facts which are not the facts, but indeed effectively impairs the contracts entered into between these parties plaintiff.

These plaintiffs respectfully submit that the wall-to-wall carpeting contracted for here belongs under the Service Occupation Tax Act and the acts corollary thereto. If it does not, then *no* service occupation or use belongs under the Service Tax Acts.

If this Court's opinion remains as it now is, holding that the carpeting is the "substance of the transactions" involved here, then too, the purchase and installation of a bathtub does not belong under the service tax acts (where it very clearly is placed not only by those acts but by the Department's own rules of interpretation and construction) because it necessarily must be said there as this Court has said here that the bathtub is the substance of the transaction and the installation would only be incidental thereto. Likewise, the transfer of a fender and its installation by an automobile repair shop would be subject to this Court's presently standing opinion, because unquestionably the fender would be the substance of the transaction while its installation would only be incidental thereto. Yet, this Court in *Fiorito* v. *Jones*, 39 Ill. 2d 531 (1968), recognized and held that such transac-

tions are service transactions and come under those acts. Other like examples abundantly appear in the *Fiorito* case. In this same category are those items, e.g., mufflers and windshield wipers, previously directed to this Court's attention in plaintiffs' original brief.

The cost of the tangible personal property in relation to services performed is of no guidance in these matters. The services performed in installing a $10.00 bathtub are no greater than those necessary for installation of a gold bathtub costing $10,000.00. The services cost the same whether they are 1% or 99% of the total purchase price.

Similarly, cabinets installed and attached to the walls of buildings (e.g. kitchen, bathroom) and which can be removed wholly intact with little damage to the fall, so that they have much more intrinsic value than carpeting removed from a floor after being tacked or cemented down, are subject to the Department's rules under the Service Tax Act and not the Retailers' Occupation Tax Act.

Carpeting, however, which may be affixed to the floor by cement or which may be installed to cover an unfinished floor and therefore has no, or little, intrinsic value when removed is deemed by this Court's opinion as a retail sale.

Such a consequence compels a re-writing of some of the Department's most significant rules of long standing because they are rendered nugatory along with the Service Occupation Tax Act itself, and, we submit, represents a major and serious departure from the law as intended by the legislature and interpreted by *all* parties to this case.

In addition to, and plaintiffs respectfully submit, confirmative of their exposition above, and what makes sense of this entire area confounded by the Department's pres-

ent position is the observation which occurs and is submitted following as most reasonable, and when observed, discloses the purpose for and intent of the 1961 amendment to the Retailers' Occupation Tax Act.

Both that Amendment and Illinois new Service Tax Acts were presented simultaneously to the General Assembly. What appears from such simultaneous presentation is the apparent motive for such concurrent submission, and that appears to be this: a most reasonable presumption for the submission of both at that time would be that the Department of Revenue understandably feeling a dire apprehension about the successful passage of the unprecedented novel Service Tax Acts simultaneously submitted the Amendment to the Retailers' Occupation Tax Act, again understandably contemplating that if the Service Tax Acts were not passed by the General Assembly, at least the Amendment to the Retailers' Occupation Tax Act might meet with success and some of the service tax areas which theretofore had escaped *all tax consequence*, might be encompassed within the scope of the 1961 Amendment. However, the Service Tax Acts were passed and approved. But so too was the Amendment to the Retailers' Occupation Tax Act. The result of the passage of that Amendment was a bastard type of progeny bearing no resemblance to the Retailers' Occupation Tax Acts because it is a counterpart of its sire, the Service Tax Acts.

These plaintiffs respectfully submit that the only valid and limited application of the Amendment to the Retailers' Occupation Tax Act so confined because of the simultaneous passage of the Service Tax Act finds its application *only* in that narrow area heretofore directed to this Court's attention, and discussed by the trial court:

At the very outset in Senate Bill 566 (the Amendments) the Legislature has declared that those Amendments *apply* only to those *certain items* of tangible personal property *which are equally available* to the purchaser for his *"particular requirements"* both:

1) As an over-the-counter purchase of a standard item from the stock of the retailer,

AND

2) As an item produced to his special order.

In other words, the Amendment applies to those situations where the purchaser *has a choice*— he can obtain the item "to meet his particular requirements". EITHER

1) By buying that item to fit his particular requirements "off the shelf" or "over the counter" from a retailer

OR

2) Despite the availability of that item to fit his particular requirements as a "stock or standard" item, to have that particular item specially produced for him. (Pltfs. Br. 24-25)

This Court's opinion will invite a plethora of cases under these taxing statutes, each of which will be decided on its own facts, thus imposing a severe burden on the trial courts without providing clear guidance for their eventual determinations".

CONCLUSION

For the above reasons, this Honorable Court should grant this petition for Writ of Certiorari.

Respectfully submitted,

EDWARD A. BERMAN,
SCHLIFKIN & BERMAN,
134 N. La Salle Street,
Chicago, Illinois

Attorneys for Petitioners —Martin Spagat, et al.

BENJAMIN CRANE,
CRANE AND KRAVETS,
100 W. Monroe Street,
Chicago, Illinois

Attorneys for Plaintiffs-Petitioners—Polk Bros. Inc., et al.

APPENDIX

UNDERWOOD, Chief Justice.

Plaintiff Spagat purchased wall-to-wall carpeting from plaintiff Polk Bros., Inc. at a price of 3607.65 and was charged an additional $30.38 as tax pursuant to the Use Tax Act (Ill. Rev. Stat. 1967, ch. 120, pars. 439.2 et seq.). A charge of $120.33 for installation was not subjected to any tax.

Plaintiffs, each suing individually and on behalf of all persons similarly situated, sought a declaratory judgment that the sale of wall-to-wall carpeting does not constitute a sale at retail and is therefore properly taxable under the Service Use Tax Act (Ill. Rev. Stat. 1967, ch. 120, pars. 439.31 et seq.) rather than the Use Tax Act. The Retailers' Occupation Tax Act and the Use Tax Act are gross receipt taxes while the tax under the Service Occupation Tax Act and Service Use Tax Act is measured by the cost of goods to the "serviceman" or 50% of gross receipts if specific proof of cost is not supplied. Plaintiffs also allege that the imposition of a tax on the tranaction in question as a sale at retail is a violation of both State and Federal guarantees of due process and equal protection.

The trial court held that Polk Bros., Inc. was a "serviceman" as to the transfer of wall-to-wall carpeting and thus subject only to the Service Occupation Tax Act. In accord, Spagat was held to be liable only under the Service Use Tax Act. Having reached this conclusion, the trial court did not find it necessary to rule on the constitutional questions presented.

The sole issue presented is whether the sale of wall-to-wall carpeting is a sale at retail of tangible personal property to which the service rendered is incidental, or a sale of service to which the transfer of tangible personal property is incidental. Plaintiffs and the trial court rely heavily on Oscar L. Paris Co. v. Lyons, 8 Ill. 2d 590, 134 N. E. 2d 755, in which this court concluded that since the sale of wall-to-wall carpeting was an occupation closely analogous to several occupations specificically exempted from the Illinois Retailers' Occupation Tax by Departmental rules of long standing, the lower court determinations that plaintiffs were engaged primarily in a service, not a selling, occupation should be affirmed. Defendants argue, however, that due to subsequent legislatice and departmental enactment, *Paris* is no longer dispositive.

In 1961, section 1 of the Retailers' Occupation Tax Act (Ill. Rev. Stat. 1961, ch. 120, par. 440) and section 2 of the complementary Use Tax Act (Ill. Rev. Stat. 1961, ch. 120, par. 439.2) were identically amended to broaden the tax base by providing in part:

> "A person who holds himself out as being engaged or who habitually engages) in selling tangible personal property at retail shall be deemed to be a person engaged in the business of selling tangible personal property at retail hereunder with respect to such sales (and not primarily in a service occupation) notwithstanding the fact that such person designs and produces such tangible personal property on special order for the purchaser and in such a way as to render the property of value only to such purchaser, if such tangible personal property so produced on special order serves substantially the same function as stock or standard items of tangible personal property that are sold at retail". Laws of 1961, p. 1742.

The Service Occupation Tax Act and the Service Use Tax Act were adopted at that same session and became effective on August 1, 1961, together with the Retailers' Occupation Tax and Use Tax amendments. Immediately thereafter, the Department of Revenue promulgated new rules, including Rule 20 which provides:

"1. WHEN LIABLE FOR TAX

Persons who engage in the business of selling portieres, drapes, curtains, marquee curtains, slip covers, floor covering, tents, tarpaulins and other similar items incur retailers' occupation tax liability when selling such items (with or without installation by the seller) to purchasers for use or consumption and not for resale whether such items are sold as stock or standard items or whether the seller produces such items on special order for the purchaser.

The same is true when custom-made Venetian blinds, window shades, awnings, screen doors, window screens storm doors and storm windows are sold at retail 'over-the-counter' without installation by the seller as a construction contractor under paragraph 3 of Rule No. 6 of the retailers' occupation tax Rules and Regulations. This is true because such items, when produced on special order, serve substantially the same function as stock or standard items of tangible personal property which is sold at retail.

2. LABOR CHARGES

In computing retailers' occupation tax liability on the retail sale of custom-made items, no deductions may be taken for the cost of labor involved in producing the finished item for sale. This is true whether such production labor is included in a lump sum price with the tangible personal property or whether such production labor is priced separately from the tangible personal property. The thing that is being sold is the finished item (drapes, carpeting, etc), and the cost of labor involved in making such item is no

more deductible than is the cost of labor that is involved in producing a stock or standard item for sale.

However, receipts from installation charges are deductible from total receipts in computing retailers' occupation tax liability if such charges are contracted for by the seller and the purchaser separately from the selling price of the finished tangible personal property, but even receipts from installation charges are taxable if the installation charge is included in a lump sum price with the tangible personal property (see paragraph 4, g, of Article 3 of the retailers' occupation tax Rules and Regulations)".

Defendants contend that the 1961 amendments were adopted to eradicate the impact of the *Paris* case and note that new Rule 20 includes, as retail occupations, those occupations previously exempted by its predecessor and which were found to be analogous to the sale of wall-to-wall carpeting in *Paris*. As further indication of legislative intent, defendants cite the following recitals and preamble to the 1961 amendment to the Retailers' Occupation Tax Act:

"An Act to amend Section 1 of the 'Retailers' Occupation Tax Act', approved June 28, 1933, as amended, for the purpose of indicating the General Assembly's intention that special order producers whose products when sold to users, serve substantially the same function as stock or standard items shall be deemed to be engaged in the business of selling tangible personal property at retail within the meaning of said Act.

"*Whereas*, certain items of tangible personal property are sometimes produced and sold at retail as stock or standard items and sometimes are custom-made (produced on special order) to meet the particular requirements of the purchaser so as to be of value only to such purchaser, and

> "*Whereas,* such specially made items are competitive to and serve the same function as items of a stock or standard nature, but have not heretofore been considered by the Courts to be subject to the same tax as the stock or standard items, and
>
> "*Whereas,* the General Assembly intends that there shall not be discrimination in the application of this Act between retail sellers of stock or standard items of tangible personal property and retail sellers of custom-made items of tangible personal property where both kinds of tangible personal property serve substantially the same function and thus involve an element of competition * * *". Laws of 1961, p. 1740.

Plaintiffs contend, and the trial court held, that the 1961 amendments do not apply to the sale of wall-to-wall carpeting because (1) they are directed at those persons who manufacture or fabricate the tangible personal property itself and (2) there is no competition between wall-to-wall carpeting and standard or stock carpets sold at retail. Plaintiffs urge that the amendments were intended to apply only in the situation where the purchaser has a choice between an "over the counter" item and the same item produced on special order, and chooses the specially produced item to avoid retail tax. We do not agree.

Wall-to-wall carpeting and carpeting purchased over the counter from a retailer do serve "substantially the same function", *i. e.,* a floor covering, even though the stock carpeting does not conform to the exact configuration of the floor area to be covered. The purchaser's initial decision is whether or not to carpet "wall-to-wall" and the fact that once he chooses to do so stock carpeting will not ordinarily suffice, is not controlling. Nor do we agree that the applicability of the amendments is properly limited to those persons who actually manufac-

ture or fabricate tangible personal property on special order. Wall-to-wall carpeting is "produced on special order", as that phrase is most reasonably interpreted, when existing carpeting is selected, measured, cut, sewn, stretched and installed to the exact specifications of the purchaser. Accordingly we find the 1961 amendments were intended to apply to the sale of wall-to-wall carpeting.

Plaintiffs contend that if the amendments do apply to the sale of wall-to-wall carpeting, they constitute an unconstitutional attempt to bring essentially service occupations within the Retailers' Occupation Tax Act and Use Tax Act. (Central Television Service, Inc. v. Isaacs, 27 Ill. 2d 420, 189 N. E. 2d 333). Plaintiffs reason that since the sale of wall-to-wall carpeting was determined to be a service occupation in *Paris*, it is clearly unconstitutional to tax such transactions as sales at retail. A close reading of *Paris* reveals, however, that the court did not specifically find the sale of wall-to-wall carpeting to be a service occupation, but rather that it was sufficiently analogous to other occupations exempted from the Retailers' Occupation Tax Act by Departmental rule that it should be similarly exempted. The court in *Paris* stated, "We are of the opinion that there is no basic difference between custom tailored carpets and custom made draperies, curtains, slip covers, *etc*". (*Paris* at p. 597, 134 N. E. 2d at p. 759). As noted above new Rule 20 includes the sale of these previously exempted custom-made items, as well as floor coverings sold on special order, as sales incurring Retailers' Occupation Tax liability. Consequently, the underlying basis of the *Paris* decision has been substantially removed and we are compelled to reexamine the nature of the transaction in question.

We have frequently stated the applicable standard as follows: "If the article sold has no value to the purchaser except as a result of services rendered by the vendor and the transfer of the article to the purchaser is an actual and necessary part of the service rendered, then the vendor is engaged in the business of rendering service and not in the business of selling at retail. If the article sold is the substance of the transaction and the service rendered is merely incidental to and an inseparable part of the transfer to the purchaser of the article sold, then the vendor is engaged in the business of selling at retail". Velton & Pulver, Inc. v. Department of Revenue, 29 Ill. 2d 524, 529, 194 N. E. 2d 253; Dow Chemical Co. v. Department of Revenue, 26 Ill. 2d 283, 285, 186 N. E. 2d 333; Kellogg Switchboard & Supply Corp. v. Department of Revenue 14 Ill. 2d 434, 437, 153 N. E. 2d 45, 47.

Applying this standard to the sale of wall-to-wall carpeting, it seems clear that it is the carpeting which is the substance of the transaction, and the services involved in laying he carpeting wall-to-wall, no matter how skillfully performed, are "merely incidental to and an inseparable part of the transfer".

Accordingly, the judgment of the circuit court of Cook County is reversed.

Judgment reversed.

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MARTIN SPAGAT and POLK BROS., INC., an Illinois Corporation, both Individually and in a Representative Capacity,

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Respondents.

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BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street, Suite 900,
Chicago, Illinois 60601 (312/793-3500),
Attorney for Respondents.

JOSEPH O. RUBINELLI,
Rubinelli & Rubinelli,
69 West Washington Street,
Chicago, Illinois 60602 (312/782-2700),
Special Assistant Attorney General,

WARREN K. SMOOT,
CALVIN C. CAMPBELL,
Assistant Attorneys General,
Of Counsel.

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondents, George Mahin, Director of Revenue, Alan J. Dixon, State Treasurer, and William J. Scott, Attorney General of the State of Illinois, respectfully pray that a writ of certiorari to review the judgment of the Illinois Supreme Court entered in this case, holding the sale and installation of wall-to-wall carpeting to be a sale at "retail" and not the sale of a "service," be denied.

OPINION BELOW

The judgment of the Illinois Supreme Court was entered on November 30, 1971, and the petitioners' petition for rehearing was denied on January 27, 1972.

QUESTIONS

Is the Illinois Supreme Court's classification of the business of selling installed wall-to-wall carpeting to be a retail sale and not a sale of a service when a Retailer's Occupation Tax is assessed on the sale of wall-to-wall carpeting, less installation costs, a denial of due process and equal protection of law?

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioners contend that the Illinois Supreme Court's opinion violates the Constitution of the United States, Fourteenth Amendment, Section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

Section 1 of the Retailer's Occupation Tax Act (Ill. Rev. Stat. 1961, Ch. 120, Par. 440) provides in pertinent part:

"A person who holds himself out as being engaged (or who habitually engages) in selling tangible personal property at retail is a person engaged in the business of selling tangible personal property at retail hereunder with respect to such sales (and not primarily in a service occupation) notwithstanding the fact that such person designs and produces such tangible personal property on special order for the purchaser and in such a way as to render the property of value only to such purchaser, is such tangible personal property so produced on special order serves substantially the same function as stock or standard items of tangible personal property that are sold at retail."

Service Occupation Tax Act (Ill. Rev. Stat. 1961, Ch. 120, § 439.103) provides for a tax:

". . . upon all persons engaged in the business of making sales of service (hereinafter referred to as servicemen) at the rate of 3% of the cost price of all tangible personal property transferred by said serviceman either in the form of tangible personal property or in the form of real estate as an incident to a 'sale of service' . . ."

Section 439.33 of the Service Use Tax Act provides for a tax:

". . . upon the privilege of using in this State real or tangible personal property acquired as an incident to the purchase of a service from a serviceman."

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"'Sale of Service' means any transaction except: (1) a retail sale of tangible personal property taxable under the Retailer's Occupation Tax Act . . . or under the Use Tax Act . . ." (Ch. 120, Secs. 439.32, 439.102).

STATEMENT OF THE CASE

Plaintiff Spagat purchased wall-to-wall carpeting from Plaintiff Polk Bros., Inc., who sells both over-the-counter carpets and special order wall-to-wall carpeting. He paid $607.65 for his carpeting and was charged $30.88 as a tax, pursuant to the Use Tax Act. An additional $120.33 charge for installation was not subjected to any tax. He filed a complaint in chancery on his own behalf and on behalf of all others similarly situated, alleging that the imposition of the Use Tax Act on this transaction was erroneous since Polk Bros., Inc. was a "serviceman" under the definitions contained in the Service Occupation Tax Act and that said transaction did not constitute a sale at "retail" pursuant to the Retailer's Occupation Tax Act. Plaintiff Polk Bros., Inc., intervened in this action in its own behalf and members of its class. The trial court held that Polk Bros., Inc. was a serviceman and that the transaction was subject to the Service Occupation Tax Act and Service Use Tax Act, but did not rule on the constitutional issues contained in the plaintiff's complaint that the imposition of a tax in this transaction constituted a violation of the equal protection of the laws and due process clauses of the State and Federal Constitutions. On appeal, the Illinois Supreme Court reversed the trial court and held that the transaction was subject to the Use Tax Act and that the imposition of the tax for the sale of the carpeting was not an unconstitutional attempt to bring this occupation within the Act. The Court determined that the "wall-to-wall" carpeting and carpeting purchased "over the counter" serve substantially the same function. It is from this decision that petitioners seek a writ of certiorari.

REASONS FOR DENYING WRIT

The single issue involved herein is whether the petitioners are a "retailer-purchaser" or "serviceman-user of services" under the definitions of the Acts in question. The Illinois Supreme Court has determined that the sale of "wall-to-wall" carpeting is a "sale at retail" and not the sale of a service. It held that the sale of wall-to-wall carpeting was subject to the same rate of tax as the sale of "over-the-counter" carpeting. The cost of installation of the carpeting was not subject to any tax at all.

Initially it should be remembered that the Retailers' Occupation Tax Act is not a tax on the privilege of buying or upon an individual sale, but rather is imposed on the business of selling tangible personal property at retail. The real occupation of the taxpayer must be observed to determine liability. *J. H. Walters & Co.* v. *Department of Revenue*, 44 Ill. 2d 95; *Central Television Service, Inc.* v. *Isaacs*, 27 Ill. 2d 420; *Automatic Voting Mach. Corp.* v. *Daley*, 409 Ill. 438; *Ingersoll Mill Mach. Co.* v. *Department of Revenue*, 405 Ill. 367.

Polk Bros. Inc. is a retailer. Retailing is its major function. The petitioners admit that Polk Bros. Inc. holds itself out as a "retailer of Floor Covering" and that it "Habitually engages in" said occupation (Abst. 9). In addition, notice should be taken that Polk. Bros. Inc. is one of the largest "Retailers" in the State of Illinois, for courts will take judicial notice of that which everyone knows to be true. *People* v. *Tassone*, 41 Ill. 2d 7; *Owens* v. *Green*, 400 Ill. 380.

The petitioners recognized the problem created by the true nature of petitioner Polk's occupation and have attempted to create a fiction by suggesting the existence

of Polk the "Retailer" and Polk the "Serviceman." The General Assembly and the Department of Revenue also recognized that situations may arise in which retailers may attempt to change hats in order to avoid taxation. Thus the Legislature specifically provided for such a contingency by amending Section 1 of the Retailers Occupation Tax Act in 1961 for the express purpose of eliminating this distinction. They indicated their intention in the Preamble to said amendment as follows: (Session Laws, 1961, Senate Bill 566, p. 1741):

> "WHEREAS, certain items of tangible personal property are sometimes produced and sold at retail as stock or standard items and sometimes are custom-made (produced on special order) to meet the particular requirements of the purchaser so as to be of value to such purchaser, and
>
> "WHEREAS, such specially made items are competitive to and serve the same function as items of a stock or standard nature, but have not heretofore been considered by the Courts to be subject to the same tax as the stock or standard items, and
>
> "WHEREAS, the General Assembly intends that there shall not be discrimination in the application of this Act between retail sellers of stock or standard items of tangible personal property and retail sellers of custom-made items of tangible personal property where both kinds of tangible personal property serve substantially the same function and thus involve an element of competition."

and to achieve this equality which the General Assembly created, the Department of Revenue interpreting Section 1 as amended, stated that the installation charges for wall-to-wall carpeting were excluded if stated separately (Rule 20 of the Rules and Regulations of the Department of Revenue).

The 1961 amendments to Section 1 of the Retailers' Occupation Tax Act and Section 2 of the complementary Use Tax Act broadened the tax base and the Court held that these amendments together with Rule 20 adopted by the Illinois Department of Revenue include the type of transaction involved herein since "wall-to-wall" carpeting and "over-the-counter" carpeting serve substantially the same purpose, i.e., a floor covering.

The petitioners contend that the decision of the Illinois Supreme Court violates the Fourteenth Amendment, Section 1, of the Constitution of the United States. It is respectfully submitted that no part of said decision is violative of this constitutional provision since it holds that if an over-the-counter item serves substantially the same purpose as a custom-made item, the tax base and treatment thereof are identical. If the Illinois Supreme Court had held otherwise it would have been a violation of this constitutional provision and the Constitution of the United States since a person who could not afford to purchase "custom-made" items would bear a greater share of tax responsibility than one who could afford to purchase same. The former would be denied "equal protection" under the law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street, Suite 900,
Chicago, Illinois 60601 (312/793-3500),
Attorney for Respondents.

JOSEPH O. RUBINELLI,
Rubinelli & Rubinelli,
69 West Washington Street,
Chicago, Illinois 60602 (312/782-2700),
Special Assistant Attorney General,

WARREN K. SMOOT,
CALVIN C. CAMPBELL,
Assistant Attorneys General,
Of Counsel.